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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 829.

CHARLES L. WALL, PLAINTIFF IN ERROR,

vs.

MONROE COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 31, 1880.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles L. Wall, plaintiff, and Monroe County, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28 day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred & fourth.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
District Judge.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Peter Jolly, county judge of Monroe County, defendant in error herein, hereby acknowledge due & legal service of the within writ this 24 day of May, A. D. 1880.

S. P. JOLLY,
County Judge, Monroe County, Ark.

The execution of the foregoing writ of error appears from the schedule hereto attached.

RALPH L. GOODRICH, *Clerk.*

2 Be it remembered that on July 7. 1879, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, Charles L. Wall, by Charles C. Waters and Jacob Trieber, esq's, his attorneys, and filed therein his complaint against Monroe County, which complaint is in the words and figures following, to wit:

In the circuit court of United States for the eastern district of Arkansas.

CHARLES L. WALL
vs.
MONROE COUNTY. } Complaint at law.

The plaintiff, Charles L. Wall, a citizen of the State of Colorado, com-

plains of the defendant, the County of Monroe, a county created by and existing under the laws of the State of Arkansas, being and situate in the eastern district thereof, within the jurisdiction of this honorable court, and for a cause of action he alleges:

And for another cause of action, plaintiff states that by the laws
3 of the State of Arkansas it is the duty of the clerk of the county court to draw, in payment of the allowances made by the county court, his warrant on the county treasurer therefor; that in pursuance thereof, the clerk of the said county of Monroe, in payment of an allowance made by the order and judgment of said court, drew his warrant on the treasurer of said county.

That afterwards, to wit, on the 5th day of July, 1875, the county court of said county, in pursuance of law, ordered the holders of all such warrants, issued prior to the 30th day of October, 1874, to present the same on or before the 1st day of January, 1876, to the county court, for examination, reissuance, and registration, or otherwise be barred from ever presenting the same; that in pursuance of said order one Frank Gallagher, being the holder of one of said warrants presented the same to said court, and the same, after examination by said county court, having been found to be valid, was cancelled, and the clerk of said court ordered to issue a new warrant therefor, which he ac-
4 cordingly did, and which is in the words and figures, as follows, to wit:

$50.00. No. 804.

The treasurer of the county of Monroe, will pay to Frank Gallagher, or bearer, the sum of fifty dollars, out of any money in the treasury for general county purposes, and not otherwise appropriated.

Given under my hand, at office, in Clarendon, Ark., this 15th day of Sept., 1875.

W. S. DUNLOPP, *Clerk.*

And, for value, said warrant was assigned to plaintiff, who is now the true and legal owner thereof; that no part thereof has ever been paid, although duly demanded, leaving said sum still due and unpaid.

(Here follow four hundred and fifty-two other counts of like import.)

That by reason of said warrants, being still due and unpaid, said defendant is indebted to plaintiff in the sum of three thousand nine hundred and ninety dollars.

Wherefore plaintiff prays judgment for said sum of three thou-
5 sand nine hundred and ninety dollars, and for all proper relief.

C. C. WATERS &
JACOB TREIBER,
Attorneys for Plaintiff.

I hereby acknowledge due service of the within complaint this 20th day of June, A. D. 1879, and waive service of summons.

WM. W. SMITH,
Att'y for Monroe County.

(Endorsed:) Filed July 7, 1879, Ralph L. Goodrich, clerk.

6 UNITED STATES OF AMERICA,
Eastern district of Arkansas:

Be it remembered that, at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden

on Monday, the 14th day of April, anno Domini one thousand eight hundred and seventy-nine, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge presiding and holding said court, the following proceedings were had, to wit, on October 9, 1879:

Comes Charles L. Wall by his attorney Charles C. Waters, esq., and files herein his amended complaint; which amended complaint is as follows:

Comes the plaintiff herein, and asks leave to file this his amended complaint.

And for a further cause of action, the plaintiff says that the defendant county, on the 13th day of October, 1874, at the district aforesaid, drew her certain other warrant upon the treasurer of said county, which warrant is as follows:

7

No. 2948. $20.00.

The Treasurer of the county of Monroe will pay to Frank Gallagher, or bearer, the sum of twenty dollars, out of any money appropriated for county purposes.

Given under my hand at office in Clarendon, Ark., this 13th day of Oct., 1874.

W. S. DUNLOPP, *Clerk.*
J. M. DAVIS. *D. C.*

That afterwards, said Frank Gallagher sold and delivered the same to the plaintiff for value, who then became and now is the lawful owner and holder thereof.

That on the 13 day of October, 1874, the plaintiff presented said warrant to the treasurer of said county, and demanded payment thereof, which payment was refused by the treasurer, for want of funds in his hands to pay the same; and thereupon said treasurer made the following endorsement on said warrant:

Not paid for want of funds, October 13th, 1874.

A. W. HARRIS, *Treasurer.*

(Here follow eleven other counts of like import and character.)

8 Wherefore the plaintiff demands judgment against said defendant county, for the amount of said warrants and interest, costs, and other relief.

JACOB TREIBER,
CHARLES C. WATERS.
For Plaintiff.

(Endorsed:) Filed October 9, 1879. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

9 UNITED STATES OF AMERICA,
Eastern district of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 27th day of October, anno Domini one thousand eight hundred and seventy-nine, at the United States court room, in the city

of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on October 27, 1879:

Comes the defendant, by S. P. Hughes, its attorney, and files herein its answer, and comes the plaintiff by Treiber and Waters, and, by consent of parties, this cause is continued.

Which answer is as follows:

The defendant, for answer to the complaint, says that, at the date of the reissue of the county warrants mentioned in said complaint, and at the date of the original issue of said warrants in lieu of which the same were reissued, the said warrants were the property either of Frank
10 Gallagher or of Ambrose Gallagher; that at the dates aforesaid, and long prior thereto and now, both the said Frank and the said Ambrose, were and are indebted to the defendant in the sum of $7,500.00 or more; which said indebtedness arose as follows, to wit: the said Ambrose was collector of the defendant's revenue for the year 1872, and made his bond, conditioned according to law, to collect, account for and pay over said revenue; upon which said bond the said Frank was a surety. Afterwards the said Ambrose collected for the defendant $8,310.00 railroad tax for said year, but failed to pay the same into the defendant's treasury. Before the said warrants had passed out of the hands of the said owners, the accounts of the said collector were adjusted by the Monroe County court, and the above mentioned deficiency was ascertained and disclosed; and for said defalcation the defendant recovered judgment in said last mentioned court on the day
11 of October, 1876, against said surety, the principal in said bond being then dead, and the said Frank Gallagher being the administrator of his estate; and the defendant avers that said recovery also took place before said Frank Gallagher had ceased to be the owner of said warrants. Said judgment, was, on appeal, affirmed on the day of April, 1877, by the Monroe circuit court, and the same remains in full force and effect, unreversed and unsatisfied, except as to the sum of about $1,000.00.

The defendant offers to set off so much of the indebtedness of said Ambrose and Frank Gallagher to it, as may be equal to the warrants herein sued upon.

WM. W. SMITH,
Defendant's Attorney.

(Endorsed:) Filed October 27, 1879. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

12 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 12th day of April, anno Domini one thousand eight hundred and eighty, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Geo. W. McCrary, circuit judge, and Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on April 13, 1880:

Comes the plaintiff, by C. C. Waters, esq., his attorney, and files herein his demurrer to the answer: which demurrer is as follows:

Comes the plaintiff herein and demurs to the answer of the defendant for the following reason: because the facts therein stated do not constitute a defense to his action.

JACOB TREIBER,
CHAS. C. WATERS,
Att'ys for Plaintiff.

(Endorsed:) Filed April 13, 1880. Ralph L. Goodrich, clerk. By W. P. Feild, D. C.

13 And on April 16, 1880, the following proceedings were had, to wit:

Comes the plaintiff, by C. C. Waters, his attorney, and comes the defendant, by S. P. Hughes, its attorney, and the court being now well and sufficiently advised of the matters arising on the demurrer to the answer heretofore filed herein, considers that the same be overruled, and the said plaintiff, electing to stand on his said demurrer, and refusing to reply to the counterclaim and set-off, set up in said answer, the same is taken as confessed.

It is therefore considered, ordered, and adjudged that said plaintiff take nothing by his said writ, but be in mercy for his false complaint, and that the defendant have and recover of and from said plaintiff all its costs in and about this suit expended.

In the circuit court of United States for the eastern district of Arkansas.

14 This is an action by the plaintiff against the defendant upon ordinary county warrants, drawn by the county clerk of the defendant county on its treasurer, in favor of one Frank Gallagher or bearer, and by him transferred to plaintiff for a valuable consideration.

The following is a copy of one of said warrants. All others are of like tenor and effect.

$50.00. No. 804.

The treasurer of the county of Monroe will pay to Frank Gallagher or bearer, the sum of fifty dollars, out of any money in the treasury for general county purposes and not otherwise appropriated.

Given under my hand, at office, in Clarendon, Ark., this 15th day of September, 1875.

W. S. DUNLOP, *Clerk.*

The warrants were renewal warrants, drawn in lieu of other warrants which, under the laws of the State of Arkansas, had been called in by the county court for examination, registration, and reissuance, and which, after examination, having been found just and legal claims against the county, were ordered canceled by the court, and the clerk directed to issue new warrants in lieu thereof to the original payee, Frank Gallagher.

15 The new warrants were transferred to plaintiff, who purchased them in good faith, for a valuable consideration, and payment being refused upon demand upon the treasurer, he instituted this action.

The answer of defendant sets up as a defense to said action that Frank Gallagher, the original payee of said warrants, was, at the time the war-

rants were issued to him, indebted to the defendant as surety on the official bond of *of* one Ambrose Gallagher, who was tax collector of said county, in a sum larger than the amount now sued for; that since then the county had recovered a judgment against the said Gallagher for a much larger amount than the warrants sued on in this case amount to, which judgment was recovered before the transfer of said warrants by said Gallagher to the plaintiff, and that the same has not been reversed or modified and is still in full force and unsatisfied, and asking that the said judgment be set off against the warrants sued on in this cause.

Plaintiff demurred to the answer. alleging as the cause of de-
16 murrer that the allegations in the answer are not sufficient to constitute a defense at law.

Upon the argument of the demurrer the following questions arose:

First. Is the defendant estopped by the reissue of said warrants to set up a defense known to have been existing at the time the warrants sued on were so reissued in lieu of the original warrants surrendered to the county court and by its order canceled?

Second. Can the claim set up in the answer, if held by the county against the original payee, when the warrants were issued or while the warrants were still in his possession, be set up as defense or set-off in a suit by a holder of said warrants for value, and who had no notice of such defense when he acquired the warrants?

On which questions the opinions of the judges were opposed and, said demurrer having been overruled and final judgment rendered in the cause for the defendant,

Whereupon, on motion of the plaintiff, by his counsel, that the points
on which the disagreement hath happened may, during the term,
17 be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided,

It is ordered that the foregoing state of the pleadings and statement of facts, which is made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided.

GEO. W. McCRARY,
Circuit Judge.
HENRY C. CALDWELL,
District Judge.

APRIL 16, 1880.

And on May 29th, 1880, the following proceedings were had.

Comes the plaintiff, by Charles C. Waters, esq., his attorney, and files herein his citation and writ of error, which are signed and allowed by the court; which citation is as follows:

18 The United States of America to Monroe County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein Charles L. Wall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry C. Caldwell, judge of the district court this 28 day of April, A. D. 1880.

[SEAL.] HENRY C. CALDWELL,
District Judge.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Peter Jolly, judge of Monroe County, defendant herein, hereby acknowledge due legal service of the within citation, this day of May, A. D. 1880.

I acknowledge service of the within citation and agree to have the appearance of Monroe County entered at October term, 1880.

WM. W. SMITH,
Atty for Monroe Co.

19 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court, this 29th day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

Attest:

[SEAL.] RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) No. 829. Charles L. Wall, plaintiff in error vs. Monroe County. E. Arkansas C. C., U. S. Filed 31st July, 1880.

OFFICE SUPREME COURT U. S.
FILED
OCT 25 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES L. WALL,
Plaintiff in Error,
vs.
THE COUNTY OF MONROE,
Defendant in Error.
No. 829.

BRIEF FOR PLAINTIFF IN ERROR.

M. T. Sanders
For Plaintiff.

C. Maynard & Co., Printers, 209 N. 4th St.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES L. WALL,
Plaintiff in Error,

vs.

THE COUNTY OF MONROE,
Defendant in Error.

No. 829.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action against a county in the State of Arkansas upon warrants drawn by the county clerk of the defendant County upon its treasurer, issued in lieu of warrants surrendered by the payee of these warrants, in pursuance of an order of the County Court of defendant County requiring the holders of all warrants, issued by said county before the 30th day of October, 1874, to present the same to said court on or before a day certain, for examination, and if found valid and just, for re-issuance and registration.

These warrants had originally been drawn by the county clerk, in pursuance of the laws of the State of Arkansas, in payment of allowances made by the order and judgment of

the County Court of said county, for materials furnished and services rendered by officers, jurors and witnesses in criminal cases, etc.

Frank Gallagher being the holder of a large number of such warrants, presented the same to the County Court, as required by the order afore-mentioned, and the same having been examined by the County Court, and found just and valid, new warrants were issued to him in lieu of those by him surrendered, which were cancelled.

These new warrants were assigned for value to plaintiff, who presented the same to the county treasurer for payment, which was refused, and thereupon this action instituted.

The defense set up by the county, is, that at the time the warrants sued on were issued to Frank Gallagher, in lieu of those surrendered by him, he was indebted to the defendant in a larger sum than the amount due on said warrants, the said Frank Gallagher having been a surety on the official bond of the tax-collector of said county, who was a defaulter and for which indebtedness judgment had been rendered against him, which is still unsatisfied.

It is now attempted to set off that judgment against Gallagher against plaintiff's claim in this cause, and thus defeat his action.

Plaintiff demurred to the answer, which was overruled.

The opinions of the Judges of the inferior courts being opposed upon the questions of law raised by the demurrer to the answer, granted a certificate of division of opinion, and by writ of error the cause was removed to this court.

The questions of law certified are:

First.—Is the defendant estopped by the re-issue of said warrants to set up a defense, known to have been existing at the time the warrants sued on were so re-issued in lieu of the original warrants surrendered to the County Court, and by its order cancelled?

Second.—Can the claim set up in the answer, if held by the county against the original payee, when the warrants were issued, or while the warrants were still in his possession, be

set up as a defense or a set-off in a suit by a holder of said warrants, for value and who had no notice of said defense, when he acquired the warrants?

ARGUMENT.

I.

Under the laws of the State of Arkansas, all demands against a county must be allowed by the County Court and entered upon the records of the court, before the same can be paid.

After the allowance for the payment of the claims is made by the court and entered of record, it is the duty of the county clerk to draw his warrants upon the treasurer of the county for the payment thereof.

The laws applicable to demands against counties and payment thereof, are as follows:

Revised Statutes of Arkansas, 1874.

Section 600: "No moneys derived from a tax levied by "the Board of Supervisors, shall be paid out of the county "treasury, except on an order duly made by said board while "in session, and entered upon the records of their proceed-"ings."

Section 601: "It shall be unlawful for any Board of Super-"visors to allow any greater sum, for any account, demand or "fee bill against the county, than the amount actually due "thereon, dollar for dollar, according to the legal or ordinary "compensation for services rendered, materials furnished, sal-"aries or fees of officers, or to direct the issuance of county "warrants upon such accounts, claims, demands or fee bills, "for more than the actual amount so allowed, dollar for dol-"lar."

Section 602: "Before any account, claim, demand or fee "bill shall be allowed by any Board of Supervisors, said board "shall require the person or persons or their legal representa-"tives, claiming the same to be due, to attach to said account, "claim, demand or fee bill, an affidavit that the same is just "and correct, and that no part thereof has been previously "paid; that the services charged for or materials furnished,

"as the case may be, were actually rendered or furnished, and "that the charge made therefor, does not exceed the amount "allowed by law, or customary charges for similar services or "materials, dollar for dollar; which account, claim, demand "or fee bill, together with the affidavit thereto, shall be filed "with the county clerk and kept in his office for the term of ten "years, and the same shall be subject to the inspection by any "member of the Grand Jury of the county at each term of the "Circuit Court, or by the prosecuting attorney of the circuit."

Section 603: "In all cases the Board of Supervisors shall "require an itemized account of any claim presented to them "for allowance, sworn to as required by the preceeding sec- "tion, and may, in all cases, require satisfactory evidence, in "addition thereto, of the correctness of the account, and may "examine the parties and witnesses on oath touching the "same, and shall have power to compel the production of all "books, accounts, papers, or documents, which may be neces- "sary in the investigation of any matters coming before "them and within their jurisdiction."

Section 605: "Whenever any allowance shall be made by "a Board of Supervisors, and an order therefor entered upon "the records, the county clerk shall, when requested by the "person in whose favor such allowance has been made, issue "a warrant for the amount of such allowance, which warrant "shall be in the following form:

"No. ——— Treasurer of the County of ———, Pay to "——— or bearer ——— dollars out of any money in the "treasury appropriated for county expenditures (or express "the particular fund out of which the warrant is to be paid). "Given at ——— this ——— day of ———, 18—.

"$———. A. B., Clerk."

The constitution of the State, adopted and ratified October 30th, 1874, abolishes the Boards of Supervisors and establishes County Courts as a continuation thereof. Schedule to constitution, section 23, which is as follows:

"The County Courts provided for in this constitution shall "be regarded in law as a continuation of the Boards of Super- "visors, now existing by law, etc."

It is contended in behalf of the County, that these warrants issued by counties are not commercial paper, free from legal and equitable defenses in the hands of a subsequent *bona fide* holder, but that such holder takes them subject to all defences, which the county could have set up, if in the hands of the original payee. And to sustain this view, we are referred to the Iowa decisions on that point.

Webster v. Taylor, 19 Iowa, 117;
Clark v. Des Moines, 19 Iowa, 199;
Clark v. Polk County, 19 Iowa, 248. 19 Iowa

And the cases decided by Judge Dillon as Circuit Judge and reported in Dillon's Circuit Court Reports.

We claim that the Iowa decisions are not applicable to warrants issued under the laws of Arkansas, even conceding that the principles laid down in those cases are good law, for the following reasons:

First. Under the constitution and laws of Arkansas there is authority for counties to issue warrants.

Second. That under the constitution and laws of Arkansas, County Courts are courts of record, and their judgments cannot be collaterally attacked.

Third. That the act of the County Court, allowing a demand against the county and ordering it to be paid, is a judicial and not merely a ministerial act.

Fourth. That under the laws of Arkansas, county warrants are negotiable instruments and not mere choses in action.

Referring to the Iowa cases above cited, we find them to be based upon the fact, that by the laws of that State, there is no express authority for the municipal officers to draw warrants on the treasurer in payment of appropriations made by a city council or Board of Supervisors.

Judge Dillon, who delivered the opinon in the case of

Clark v. Des Moines, *supra*, says:

"The city council audit and allow claims and demands,
"and their action in this regard is to be entered of record.
"Upon a certified copy of the proceedings, the city treasurer

" would be authorized to pay the claimant. *But by usage,*
" or perhaps under a by-law, orders like those before us are
" drawn upon the treasurer. This mode is adopted for *con-*
" *venience*, and these instruments are not to be assimilated in
" all respects to ordinary commercial paper."

Under the laws of Arkansas it is different.

Section 605 : Rev. Stat., makes it the duty of the County Clerk, after an allowance is made by the County Court and entered of record to draw a warrant upon the treasurer, at the request of the person in whose favor such allowance has been made.

Under this section there can be no doubt that in case of refusal by the clerk to draw the warrant after the allowance is made and entered upon record, when requested by the party in whose favor the allowance was made, that he could be compelled to draw this warrant by a writ of mandamus.

People v. Flagg, 16 Barb. 503;
State v. Buckles, 39 Ind. 272;
Stabe v. Mount, 21 La. 352.

In regard to claims against counties, where the validity of the claim has been established by the proper authority, no element of discretion remains to be exercised in drawing the order for payment, and this duty will be enforced by mandamus.

Cuthbert v. Lewis, 6 Ala. 262.

The act of drawing the warrant by the clerk is ministerial and his duty plain.

That the act of the County Court in making the allowance is a judicial act, we refer to section 603, Rev. Stat.

This section not only requires the creditor of the county to have his demand sworn to as provided by section 602, Rev. Stat., but the County Court is clothed with power to require, in all cases, satisfactory evidence in addition thereto, and may examine the parties and witnesses on oath touching the same, and has also the power to compel the production of all books, accounts, papers or documents, which may be necessary in the investigation of any matter coming properly before them, and within their jurisdiction.

Of all these matters the County Court has exclusive original jurisdiction.

See Constitution, Art. 7, Sec. 28, which is as follows:

"The County Court shall have exclusive original jurisdic-
"tion in all matters relating to county taxes, roads, bridges,
"ferries, paupers, bastardy, vagrancy, the apprenticeship of
"minors, *the disbursement of money for county purposes*,
"*etc.*, subject only to the appellate jurisdiction of the Circuit
"Court."

The Supreme Court of Arkansas, at an early day (1847), settled the question as to the status of county warrants drawn in conformity with the statute.

The court says:

"The statute authorizing the issuing of warrants in favor
"of persons having claims against the county, prescribed the
"form thereof, and under that form, *there can be no doubt*
"but that they are endowed with the properties of negotiable
"instruments."

Crawford County v. Wilson, 7 Ark. 219.

In the same case the court further says:

"When such warrants are issued to an individual for a debt
"due him by the county, and he transfers them, the legal in-
"terest passes to the assignee, who may bring an action against
"the county for the amount of them, and the county is dis-
"charged from obligation to the original payee."

If county warrants would have been mere choses in action, no suit could, under the laws of Arkansas, as then in force, have been instituted by the assignee thereof without joining the assignor.

In the case of Carnall v. Crawford County, 11 Ark. (6 Eng.), Mr. Justice Scott, who delivered the opinion of the Supreme Court, says on page 629:

"The subject-matter of an allowance, in the sense of the
"statute, must necessarily then embrace within its scope what
"may be the subject-matter of a judgment as to the fiscal affairs
"committed to the jurisdiction of the County Court, and in

"doing so seems inevitably to embrace all judgments, that "presuppose and include any action of the Court granting or "refusing an allowance against the revenue or the treasury; "and this seems to exclude the idea that in such cases separ- "ate appeals would lay as to each item allowed or disallowed "in the investigation and *judicial* adjustment of matters, that "would result in aggregate balance, and be the foundation of "a judgment."

It will then be seen that the allowance or refusal of a claim by the County Court under the statute of Arkansas is considered by the Supreme Court of the State as a *judicial* adjustment or judgment.

This construction by the highest court of the State of one of its statutes is conclusive on this court, and should be followed.

Bank v. Hamilton v. Dudley's Lessee, 2 Pet. 524;
Elmendorf v. Taylor, 10 Wheat. 159;
Green v. Neale's Lessee, 6 Pet. 298;
Miles v. Caldwell, 2 Wall. 35.

Mr. High, in his work on extraordinary remedies, after a careful review of the leading cases, declares the doctrine to be: "That where the authorities of a municipal corporation, vested "with powers of quasi-judicial nature, as to the auditing and "payment of demands against the body corporate, have exer- "cised their judgment and passed upon claims within their "jurisdiction and properly presented to them their decision, "like that of any judicial tribunal, is final and conclusive un- "til reversed in a legal and proper manner, and mandamus "will not lie to control such decision."

High's Extraordinary Legal Rem. 346, and authorities there cited.

To the same effect are the decisions of the Supreme Court of Arkansas:

Gunn v. Pulaski County, 3 Ark. 427;
Bruce v. Arkansas County, 9 Id. 140.

There can be no doubt but that if the money to pay these warrants had been in the treasury, the treasurer would have been bound to pay the warrants, when presented, or otherwise he would, under the laws of this State, have forfeited to the holder of the warrants fourfold the amounts thereof.

Section 1037, Rev. Stat. of Ark., 1874, is as follows:

"If he (the county treasurer) shall neglect or refuse to pay "any warrant drawn on him by order of the Board of Super- "visors of his county, having in his hands money applicable "thereto, he shall forfeit and pay to the holder of such "warrant fourfold the amount thereof."

Thus a treasurer will be compelled by mandamus to make payment of warrants drawn upon him by the proper officer, the warrants giving the persons holding them a clear right to the amounts indicated.

Exparte Selma & G. R. R., 46 Ala., 423 v. Hunter, 14 La. Ann., 221.

The acts of the County Courts making an allowance, is clearly a judicial act.

That the County Courts are not merely ministerial bodies, but judicial, we refer to the Constitution of the State, Art. 7, Sec. 1, which reads as follows:

"The judicial power of the State shall be vested in one "Supreme Court, in Circuit Courts; in County and Probate "Courts and in Justices of the Peace," etc.

The fact that it has a clerk and seal, is *prima facie* evidence that it is a court of record.

Adamson v. Adamson, 9 Ark. 26;
Steamboat v. Erskine, 7 Mo. 216.

That the orders of the County Court are regarded as judgments and subject to the same rules as a judgment of other courts, we refer to

Reif v. Comer, 10 Ark. (5 Eng.) 241, where it is held, that after the lapse of the term at which a judgment is rendered,

the County Court loses its power over them and cannot set them aside at a subsequent term.

And that an allowance is a judicial act we refer to

Bren v. County Court, 9 Ark. (4 Eng.) 241.

Jefferson County v. Hudson, 22 Ark., 595, where it is held: "The allowance by the County Court of a claim against the "county in favor of the claimant, is in the nature of the judg- "ment."

If the allowance of a claim by the County Court is a judgment, it must be considered as a new debt which can in no manner be affected by the character of the old one, and the original claim and all equities existing between the parties at that time, are merged in the judgment.

Ault v. Zehering, 38 Ind., 433.

In that case the assignee of a note sued the maker, who had an off-set to the note consisting of a judgment against the assignor.

This off-set the maker failed to present when sued upon the note, and judgment was therefore rendered against him without taking the set-off into account.

Suit was subsequently brought in Indiana upon the judgment, and in the last action the defendant sought the benefit of the set-off, which he had failed to assert before, and it was held that the set-off would not be entertained, because the original note and all the equities were merged in the judgment. A defense which might have been made available in the original suit cannot be set up in an action on the judgment.

Noble v. Merrill, 48 Me.;
Guinard v. Hysinger, 15 Ill. 288;
Flint v. Sheldon, 13 Mass. 443;
Ellis v. Clark, 19 Ark. 420.

The warrants sued on in this cause are at least *prima facie* evidence that a judgment has been rendered, and the assignee of these warrants must be treated as the assignee of the judgment.

The case of Mayor v. Ray, 19 Wall. 468, must be distinguished from this case for the same reason as the Iowa cases.

In that case there was no authority for the city clerk to draw the warrants, but they were drawn "for convenience, sanctioned by usage."

Still that case can hardly be considered as settling fully the question whether warrants are commercial securities to the full extent, or are subject to defenses, even if in the hands of a *bona fide* holder, although the decision of the lower court was reversed.

The judges of this court were equally divided on that question, Justice Hunt concurring in reversing the judgment upon the ground that the warrants sued on in that cause had been purchased by the plaintiff after protest for non-payment.

In this case the plaintiff does not occupy that position, but is in the attitude of a *bona fide* holder.

II.

Is the defendant, by the act of the County Court re-issuing the warrants, estopped from setting up the defense set up in the answer?

The complaint alleges "that the 5th day of July, 1875, the County Court of said county, in pursuance of law, ordered the holders of all warrants issued prior to October 30, 1874, to present the same on or before the first day of January, 1876, to the County Court, for examination, re-issuance, registration, or otherwise be barred from ever presenting the same.

That in pursuance of said order, one Frank Gallagher being the holder of one of said warrants, presented the same to said court, and the same having been found valid by the County Court, was cancelled, and the clerk ordered to issue a new warrant therefor.

That for value said new warrant was assigned to plaintiff, and by him payment demanded and refused; thereupon this suit was instituted.

These allegations, not being controverted by the answer are under the code of practice of this State, to be taken as admitted.

Winter v. Baudel, 30 Ark. 362.

As to the presumptions of law, they are, that possession of commercial paper raises the legal presumption that the holder is the owner, and that he obtained it for value before maturity and without notice.

Chambers County v. Clews, 21 Wall. 323;
Andrews v. Chadbourne, 19 Barb. 147;
Pratt v. Adams, 7 Paige, 616;
Wicks v. Adirondack Co., 2 Hun. 112.

Under the laws of Arkansas, the County Courts are authorized to call in at any time any outstanding warrants, for the purpose of ascertaining whether any of the warrants were fraudulently issued, or are not just and legal demands against the county.

The laws authorizing these proceedings are as follows:

Revised Statutes, 1874, Section 614:

"Whenever the Board of Supervisors of any county may "deem it expedient to call in the outstanding warrants of "said county in order to reduce, cancel, re-issue or classify "the same, or for any lawful purpose whatever, it shall be "the duty of said Board to make an order for that purpose, "fixing the time for presentation of said warrants, which shall "be at least three months from the date of such order; pro- "vided that said order for the calling in of said warrants "shall not be made oftener than once in every three years.

Section 616: "All persons who shall hold any warrants of "said county, and neglect or refuse to present the same as re- "quired by the order of the board and the notice aforesaid, "shall thereafter be forever debarred from deriving any bene- "fits from their claims."

These sections were amended by an act of the General Assembly, approved February 27, 1875, which act is as follows:

Section 1. "That once during the year of 1875, and every "succeeding year thereafter, the County Court of any county, "or the municipal authorities of any city or incorporated

"town in this State, may call in the outstanding scrip or war-
"rants of said county, or the floating evidences of indebted-
"ness of said city or incorporated town, for the purpose of can-
"celling the same."

SEC. 2. Applies to cities only.

SEC. 3. "That when the scrip or warrants so called in shall
"be presented to the court or council; it shall be the duty of
"said court or council thoroughly to examine the same, and
"to object all such evidences of indebtedness as in their judg-
"ment their county, city or incorporated town is not justly
"or legally bound to pay, subject to appeal to the Circuit
"Court."

SEC. 4. "That the law now in force, governing in cases
"where counties are authorized to call in their floating indebt-
"edness, shall apply and govern in proceedings had by coun-
"ties, cities or incorporated towns under the provision of this
"act."

SEC. 5. "That all laws, parts of laws in conflict with the
"provisions of this act are hereby repealed, and that this act
"take effect from and after its passage."

Pamphlet Act. Gen Assembly of Arkansas, 1874–5, page 189.

From these provisions of law it will be seen that the County Court is vested with the exclusive original jurisdiction to thoroughly examine all warrants presented to them for re-issuance, and to reject all such evidence of indebtedness as in its judgment the county is not justly or legally bound to pay, subject to the supervisory appellate jurisdiction of the Circuit Court.

We may confidentially assert that the doctrine is now well settled, that if a certain body or tribunal is invested with power to decide whether certain conditions precedent, or certain acts have been complied with, then their determination of the matter which they are authorized to decide, will be in favor of the *bona fide* holder of the certificate of indebtedness which they were authorized to issue only after certain acts had been complied with, or certain conditions performed, bind the corporation.

Knox County v. Aspinwall, 21 How. 539;
Town of Colona v. Evans, 92 U. S. 484;
Town of Venice v. Murdoch, 92 U. S. 495;
And other cases too numerous to cite.

And it has been held that where an officer or Board is clothed with authority to audit and settle a claim, such decision is conclusive as to the amount of the claim, but REVIEWABLE as to whether the claim was within the jurisdiction of the Board or officers.

Kendell v. United States, 12 Peters, 24.

In this case the County Court was authorized to examine all warrants presented, and reject the same, if the county is not *legally or justly* bound to pay the same.

Gallagher presented his warrants, the County Court examined the same, and decided that the county was legally and justly bound to pay the same although the indebtedness of Gallagher to the county as surety on the bond of the tax collector was then existing and known to the court, and now, after the warrants had been assigned to plaintiff, who bought the same in good faith, it is attempted by the county to collect its judgment against Gallagher by setting it off against plaintiff's claim, for the reason that the warrants were once Gallagher's property, although they are so no more.

The County Court having passed upon the legality and validity of the claim once, its judgment cannot now be collaterally attacked.

Carroll v. Board of Supervisors, 28 Miss., 38, which is exactly in point.

Let us suppose that the County Court had decided that the warrants presented by Gallagher were not just and legal claims against the county, and Gallagher, without having the judgment reversed upon appeal, should have instituted this action in the Circuit Court, can there be any doubt (conceding the right of the county to call in its warrants for that pur-

pose) but that the judgment of the County Court would have been a bar to a recovery?

The judgment of the County Court could not have been attacked collaterally, nor could the Circuit Court, in that action, have examined into the validity of the warrants, or the righteousness of the judgment of the County Court.

But it is contended by defendant that, although the claimant or creditor could have appealed, the county could not have done so; relying upon

> Chicot County v. Tilghman, 26 Ark. 461, and
> Shirk v. Pulaski County, 4 Dill. C. C., 209.

The first case was decided in 1868, and the latter was based upon a contract made under the constitution of 1868, which failed to provide for the right of appeal by or in behalf of a county.

But by the constitution of 1874, now, and at the time the warrants in controversy in this cause were issued in force, it is expressly provided that any citizen or tax-payer may, in all cases of allowances made for or against counties, appeal from the judgment of the County Court.

Article 7, Section 51, of the present constitution, is as follows: "That in all cases of allowances made for or against "counties, cities, or towns, an appeal shall be to the Circuit "Court of the county at the instance of the party aggrieved, "or on the intervention of any citizen or resident and tax-"payer of such county, city, or town, on the same terms and "conditions on which appeals may be granted to the Circuit "Court in other cases, and the matter pertaining to such al-"lowances shall be tried in the Circuit Court *de novo*. In "case an appeal be taken by any citizen, he shall give a bond "to the proper county, conditioned to prosecute the appeal "and save the county from costs, on account of the same be-"ing taken."

The Supreme Court of the State, in a late case, clearly intimates that since the adoption of the new constitution an appeal may be taken in behalf of the county.

The court, speaking of the case before them, which arose while the old constitution was still in force, says:

"This case was determined before the adoption of the pres-
"ent constitution, until *which time* the law made no provision
"for an appeal by or in behalf of the county, from an order or
"judgment of the County Court allowing claims against the
"county."

Cole v. White Co., 32 Ark. 50.

The reason why the constitution provides for an appeal by a citizen or tax-payer in behalf of the county only, and not by the county itself, is that the Judge of the County Court is, under the laws of Arkansas, also its executive officer, and as it is unreasonable to suppose that the judge, after allowing a claim or demand against the county as just and legal, would cause an appeal to be taken from his own decision, provision was made for appeals in behalf of the county by any interested citizen.

Thus, any illegal allowance by the County Court may be appealed to and set aside by a superior tribunal which is clothed by the constitution with appellate jurisdiction.

The case of Goyne v. Ashley County, 31 Ark. 552, is a case in which the County Court made an allowance for a greater amount than was due, and upon an appeal by a citizen and tax-payer the amount of the judgment was reduced by the Circuit Court, and the action of the Circuit Court affirmed by the Supreme Court, without questioning the jurisdiction of the Circuit Court.

The fact that an appeal could have been taken from the action of the County Court, in allowing or disallowing a claim, shows that its actions in the premises are deemed by the lawmakers of this State to be a judicial act.

"Errors in the proceedings of an inferior court, which
"could have been corrected on appeal, cannot be reversed by
"the superior tribunal, by *certiorari*."

Alston ex parte, 7 Ark. 580.

If, then, *certiorari* would not lie in this case, an attack of the proceedings of the County Court in an action upon the judgment would clearly not be permitted.

In Graham v, Parham, 32 Ark., the Supreme Court, speaking of judgments of County Courts, says on page 696:

"Conceding this (the action of the County Court) to have "been error, the order was not void for want of jurisdiction, "and no appeal having been taken, the Circuit Court could "not review the order and reverse it for error in this proceed-"ing."

III.

The defense set up by the county is not one arising out of or attached to the particular transaction in which the warrants sued on were issued. It is an attempt to set off a claim held by the county against the original payee, based upon the default of the county tax collector for the year 1872, on whose official bond the said Gallagher was one of the sureties.

"Claims and demands to be set off must be mutual, both "as to the nature of the demand and identity of parties to the "record."

Walker v. Chaun, 16 Ill. 489.

"A plea to an action on a bill of exchange setting up that at "maturity thereof it was in in the hands of a party who was "and still is indebted to the defendent, is not good. A set-off "must be mutual between the parties in interest and in their "own right."

R. R. Co. v. Neale, 16 Ill. 269.

In this case Gallagher is not a party to the suit, nor is it necessary for him to be one.

If the doctrine set up by defendant is sound law, a plea, that before the plaintiff became the owner of the warrants they were held by another party, who had purchased them from Gallagher, and that said party, while the warrants were still in his possession, became indebted to the county,

which debt is still unsatisfied, would be good. This would at once destroy the negotiability of these warrants, as a purchaser would be compelled to enquire not only whether there is any debt due from the original payee or his own vendor to the county, but also to ascertain by whom they were ever owned and whether the county has any claim or demand against such person. A careful examination of the authorities relied upon by defendant will show that in no instance has it ever been held that claims arising independently of the transaction in which the warrants were issued, could be set-off by the county in a suit by a *bona fide* holder.

It has been held that the county is not estopped to set up the pleas of *ultra vires*, want or failure of consideration, payment or redemption, and fraudulent reissue but neither of these is set up in this case.

Judge Dillon, in his work on Municipal Corporations, states, that the county is not esstoped to set up the following defenses in a suit upon warrants; "*Ultra Vires*, fraud, want of consideration."

Dillon on Municip. Corp., Vol. 1, Sec. 412.

In Shirk v. Pulaski County, *supra*, the same learned Judge declared the true rule to be:

"Within the limits of their power as conferred by statute, "the County Courts, in determining the amount due a cred- "itor of the county, in the absence of fraud or mistake, bind "the county; but the County Court cannot bind the county "by ordering the claim to be paid, which is not made a county "charge by statute," etc.

It is conceded that the warrants sued on in this cause were legally issued, that the amount of the allowance is correct, and that the County Court acted within the limits of its jurisdiction, and there is neither fraud nor mistake set up as a defense.

The most favorable position defendant could claim, would be that county warrants are on the same footing as bills of exchange or promissory notes negotiated after maturity.

Conceding that warrants are of no higher grade than these, could the county set up the defense pleaded in this case?

Under the merchant law, the endorser of a negotiable note, endorsed after maturity, take it subject to all the equities attached to it in the hands of the payee; but these equities must be such as are connected with the note itself, and not such as grow out of distinct and independent transactions.

Washington Nat. Bank v. Texas, 20 Wall. 98.
Oulds v. Harrison, 28 Eng. L. & E. 524.
Burrough v. Mass., 10 Barr & Cress. 588.
Chandler v. Drew, 6 N. H. 469.
Wharton v. Hopkins, 11 Ind. 505.
Renwick v. Williams, 2 Md. 356.
Hughes v. Large, 2 Penn. St. 103.
Robinson v. Brudlove, 10 Conn. 31.
Britton v. Bishop, 11 Ver. 70.
Robertson v. Brudlove, 70 Port. (Ala.) 541.

Counsel for defendant admit that such would be the law under the law merchant, but claim that the statute of Arkansas changes this rule, and relies upon an old statute which we claim has been repealed by an act of the General Assembly of 1873, and was no more in force when these warrants were issued.

The statute relied upon by defendant is as follows:

Section 565 Revised Statutes of Arkansas, 1874, or Section 3, Chapter 15, Revised Statutes 1858.

"Nothing contained in this act shall change the nature of "the defense or prevent the allowance of discounts or off-sets, "either in law or equity, that any defendant may have "against the original assignor previous to the assignment, or "against the plaintiff or assignor after the assignment."

This section, it has been held by the Supreme Court of Arkansas, makes a note, even if negotiated before maturity, subject to the defense of sett-off or payment to the payee before assignment.

Smith v. Capers, 13 Ark. 9.

But since that decision, the law relating to bills of exchange has been amended by an act of the General Assembly of the State of Arkansas, Approved April 24, 1873, which is as follows :

Section 26. " In case of assignment of a thing in action, " the action by the assignee shall be without prejudice to any " discount, set-off, or defense now allowed, and when the as- " signment is not authorized by statute, the assignor must be " a party as plaintiff or defendant."

" This section shall not apply to bills of exchange nor to " common orders or checks, or to promissory notes negotiable " or assignable by the law merchant, but all such instru- " ments shall be governed by the law and customs of mer- " chants."

Pamphlet Acts of Ark. 1873, page 215.

The digester of the revised statutes of 1874, in copying the above section, inserted the words " *transferred in good faith and for value before maturity.*"

By what authority these words were inserted we do not know, but the fact of their insertion does not change or alter the law, as the revised statutes are merely "A digest of the statutes of Arkansas," and not conclusive evidence of the law therein contained, so as to preclude reference to or control in case of any discrepancy the effect of the original act of the legislature.

The supreme court of the State, in two cases decided since the enactment of the act of April 24, 1873, held that the above section 565, or section 3, of chapter 15, of the revised statutes of 1858, has been repealed by said act, and that all bills of exchange, common orders, checks, or promissory notes, negotiable or assignable by the law merchant, were put on the footing of mercantile paper, so that defenses must be governed by law merchant.

Sayre v. Thompson, 28 Ark. 336.
Nisbett v. Brown & Norton, 30 Ark. 585.

That county warrants are negotiable instruments, has been decided in Crawford County v. Nelson, 7 Ark. 219.

But conceding that the decisions of the Supreme Court of Arkansas sustain the position of defendent, these decisions are not binding on this court upon questions of general commercial law.

Swift v. Tyson, 16 Pet. 1.
Watson v. Tarply, 18 How. 520.
Oates v. First Nat'l. Bank, 100 U. S. 239.

As in the latter case, the act of the Legislature of Arkansas of April 23, 1873, places all bills and promissory notes under the protection of the commercial law, and this court will determine as to what these rules and doctrines are.

In the case of Washington National Bank v. White, *supra*, this court held that the endorsee, after maturity, takes it free from all equities, except such as are connected with the note itself.

Applying this rule in this cause, the defense set up by the defendant falls to the ground.

We, therefore, submit that the demurrer to the answer should have been sustained and judgment rendered for plaintiff.

Respectfully submitted,

[redacted] M. F. Sale

For Plaintiff.

OFFICE SUPREME COURT U.S.
FILED
DEC 24 1880
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

CHARLES L. WALL, PLAINTIFF IN ERROR,
vs.
MONROE COUNTY, DEFENDANT IN ERROR.
No. 829.

Brief for Defendant in Error.

This was an action upon county warrants. The defence was that the payee of the warrants, from whom Wall acquired them, was indebted to the county, at the time of their issue, in a much larger sum than the amount of the warrants; that before their transfer to Wall, this indebtedness had been reduced to judgment; and there was an offer to set off the judgment debt against the warrants.

The status of this class of securities has been settled by a long line of adjudications, which present but little diversity of opinion. These instruments are used for the purpose of giving to the public creditors evidence of the amount of their demands against the county treasury. They have not the essential attributes of commercial paper, but are non-negotiable choses in action. They pass from hand to hand by delivery, and the holder may maintain an action upon them in his own name; but he takes them subject to all legal and equitable defences which existed against them in the hands of the original payee.

The cases are collected in Dillon on Municipal Corporations, (2d edition,) § 406, and in Daniel on Negotiable Instruments, (2d edition,) §§ 420, 427, 435.

Counsel for the plaintiff in error supposes that there is some peculiarity in the law of Iowa which would break the force of the decisions in School District vs. Lombard, 2 Dillon, 493; Clark vs. DesMoines, 19 Iowa, 199; Clark vs. Polk County, Id., 248; Shepherd vs. District Township, 22 Id., 595; Taylor vs. District Township, 25 Id., 447.

The case of U. S. vs. Miller County, 4 Dillon, 233, was tried before Judges Dillon and Caldwell, both of whom are familiar with the legislation of the two states on this subject, and it is there said that their laws, so far as relates to ordinary county warrants, are in legal effect identical.

This court, in Police Jury vs. Britton, 15 Wall., 566, drew the line of distinction between negotiable securities and ordinary municipal warrants, necessitated by the current expenses of the corporation, when it said "that a municipal corporation, which is expressly authorized to make expenditures for certain purposes, may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement, or rescission, in whole or in part, that may be just and proper, in consequence of illegalities or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day, and transferable from hand to hand. Such instruments, transferred before maturity to a bona-fide purchaser, leave behind them all equities and inquiries into consideration and the conduct of parties, and become, in

the hands of an innocent holder, clear obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security."

However, since the case of Mayor vs. Ray, 19 Wallace, 468, in which the question of the negotiable character of such instruments as those now in suit came directly before this court, it has ceased to be an open question.

But it is contended that the highest court in Arkansas, in Crawford County vs. Wilson, 7 Ark., 219, has decided that county warrants "are endowed with the properties of negotiable paper."

It must be conceded that the language of the judge who wrote that opinion is not very guarded. What he meant was, that they had some, not all, of the qualities of negotiability; for instance, the legal title to the warrants, they being payable to bearer, might be transferred from one person to another by delivery. This is apparent from his statement, at the beginning of the opinion, that the only question raised by the record was, whether warrants were transferable by mere delivery, so as to vest the legal interest in the holder. No court in Arkansas has ever held that county warrants were negotiable in the sense that, as between the county and any holder, equities were concluded or inquiries shut out respecting the origin or title to the paper, or the consideration by which it was supported, or whether title to it carries the right to the full amount represented on its face, irrespective of any transactions or relations that might have existed between the original or intervening parties.

Again: It is said that the act of the county court in auditing these claims and issuing warrants therefor, was a judicial determination of the county's liability, and that the matter cannot be inquired into collaterally or by way of defence to an action on the warrants.

This precise objection was raised in Shirk vs. Pulaski County, 4 Dillon, 209, which was an Arkansas case. There the county, in consequence of the depreciation of its scrip, had issued, for officers' fees, for the support of paupers, and for work and labor done for the benefit of the county, warrants for five or ten times the fees as fixed by law, or the money value of the support of paupers, or work and labor done for the county. These warrants had passed into the hands of a third party, who was doubtless ignorant of the fraud that had been perpetrated by the county authorities. And he contended that the county could not go behind the judgment of allowance and inquire into the consideration. But the court ruled that the county was not estopped to set up that the warrants had been issued five or ten for one and treated the warrant-holder as the equitable assignee of the valid legal claim of the payee, subject to any payments the county might have made to any holder of a warrant representing a portion of such claim.

What is there, then, in the act of the county court in re-issuing these warrants, which should estop the defendant in error to say that it had a set-off against Gallagher, the original payee of them? The auditing of the claims, in the first instance, and issuing the original or first warrants, did not conclude the county from denying that the claims were legitimate, or from saying that they were allowed, in the face of a statutory prohibition, or for more than the statute distinctly limits, or from bringing forward any other defence that it might have. What mystical virtue lay in the examination and cancellation of the old warrants, and in the re-issue of others in lieu thereof, which should forever make the substituted warrants sacred and unimpeachable in the eyes of all courts? Confessedly this calling in of outstanding scrip for cancellation and reissue was but a mere process for eliminating fraudulent issues and for ascertaining the present indebtedness of the county and what portion of it the county was justly or

legally liable to pay. Such settlements have not the force of judgments to estop either the clainant or the county.—(See Shirk vs. Pulaski County, supra, and cases there cited.)

Judgments are not conclusive unless the same matters were or might have been litigated in the previous controversy. The defendant in error has never asserted that these Gallagher warrants were fraudulent, or that they were not valid obligations, or a part of the county debt, which it was bound to provide for. On the contrary, it has always acknowledged, and now by its plea admits, that it owed Gallagher the amount expressed in the warrants; but it says that Gallagher was indebted to it in a still larger sum, which it offers to set off.

Where is the inconsistency?

But it is argued, why did not the county court adjust this cross-demand when it re-issued his scrip to Gallagher? There are two excellent reasons why this was not done: First, the laws under which the scrip was called in, and which are quoted at length in the brief of the counsel for the plaintiff in error, contain no provision for a compulsory settlement with the public debtor; that is to say, no provision which would have authorized the county court to appropriate Gallagher's scrip, which was in its custody for the purpose of being examined and re-issued, to the payment of his debts without his consent, or to detain his scrip until he should make a fair settlement. These laws have no reference to settlements with the public debtor. Their object is to ascertain, not who owes the county, but whom the county owes and for what. Under the laws the county court has the right, after publication in two or more newspapers, to say to all warrant-holders, "Bring in your scrip that it may be inspected, and, if found to be regular, new scrip will be issued to you in place of it." But it could not add "provided you do not owe the county anything; for, if you do, your scrip will be impounded until you pay."

Secondly, Gallagher's liability to the county was, at the date of the re-issue, a contingent one, and the amount of it was unliquidated. He was a surety upon the bond of the county collector for the year 1872. If the collector paid over the revenue, or if, being dead, his estate, of which Frank Gallagher was administrator, made the amount of the defalcation good, then Frank Gallagher owed the county nothing. Moreover, before the liability of the surety could be fixed, it was necessary to bring an action upon the bond. The county did not recover judgment against Gallagher until October, 1876,—long after the re-issue of the warrants—and from this judgment an appeal was prosecuted, so that the litigation was not finally determined until April 1, 1877.

Then as to the right of set-off: Surely it is a fanciful notion that the debt to be set off must originate in, grow out of, or be in some manner connected with, the contract upon which the suit is brought. This may be the rule in some states, but it has no place in the jurisprudence of Arkansas. If it did arise out of the same transaction it would not be a set-off, but a counter-claim, or the subject of recoupment.

See the statutory definition of counter-claim, sec. 4,570, Gantt's Digest of the Statutes of Arkansas.
Wheat vs. Dotson, 12 Ark., 703.
Robinson vs. Mace, 16 Id., 97, 103.
Desha vs. Robinson, 17 Id., 228, 245.
Bloom vs. Lehman, 27 Id., 489.
White vs. Brayan, 32 Ark., 281.
See, also, on the distinction between the two modes of defence, Baltimore and Ohio R. Co. vs. Jamison, 13 West Virginia, 833.

The only limitations imposed by the law of Arkansas upon the right to plead a set-off are, that the action must be ex contractu and the debt to be set-off must originate in contract or be in the shape of a judgment.

Gantt's Digest, sec. 4,572.

Set-off being the creature of statute, the federal tribunals will administer the laws of the state in which they sit.

Stewart vs. Anderson, 6 Cranch, 203.
Mandeville vs. Union Bank, 9 Id., 9.
Brabston vs. Gibson, 9 Howard, 263.
West vs. Aurora City, 6 Wallace, 139.
Partridge vs. Ins. Co., 15 Id., 573.
Blount vs. Windley, 95 U. S., 173.

But it is alleged that these warrants are at least of equal dignity with overdue commercial paper and that the holder of such paper takes it liable only to such equities as attached to the paper itself, and not such as arise from any collateral transaction. This is the rule in England; but in the United States there is a decided conflict of authority on this subject. It appears from a note to § 1,437 of Daniel on Negotiable Instruments, where the cases are collated, that the courts of Virginia, Maryland, and Pennsylvania adhere to the English rule, which excludes set-offs existing at the date of the transfer of the overdue paper; while those of Massachusetts, Maine, New Hampshire, Vermont, South Carolina, and Alabama admit such set-offs. I am not aware that this court has declared itself on the question, though National Bank vs. Texas, 20 Wallace, 72, is cited for the plaintiff in error. But his counsel seems to have mistaken the separate opinion of Mr. Justice Swayne in that case for the opinion of the court. The ground upon which that case was decided was the failure to identify the bonds and a defect in the proof that they were issued in aid of the rebellion.

But the fallacy of the reasoning in the brief for plaintiff in error consists in assimilating these drafts, drawn by one officer of a municipal corporation upon another officer of the same corporation, and intended merely to furnish vouchers to the disbursing officer, to negotiable paper even after maturity. They are mere choses in action. The transferee occupies no higher plane than the trans-

ferrer, but takes subject to any legal rights or equities residing in the debtor.

Discussing this case, now, in the light of the local law, and not as belonging to the domain of commercial jurisprudence, the statutes upon which the defendant in error particularly relies are sections 563 and 565, of Gantt's Digest, which read as follows:

"All bonds, bills, notes, agreements, and contracts in writing for the payment of money or property, or for both money and property, shall be assignable."

"Nothing contained in this act shall change the nature of the defence, or prevent the allowance of discounts or offsets, either in law or equity, that any defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment."

The practical effect of this statute was to abolish the rule of the law-merchant concerning negotiable paper; or, to speak more accurately, that rule never had any existence in Arkansas until recently; the common law and statutes passed prior to the fourth year of King James the First, being alone recognized there without special re-enactment.—(Gantt's Digest, sec. 772.)

The first case that arose under this statute was Aldham vs. Wallace, 4 Ark., 559. Aldham had made his bond to Willis Wallace for $264.80, payable at one day, and this bond was, on the day of its execution, assigned to Leonard Wallace. In an action by the assignee against the maker, it was held the maker might set off any demand due him by the assignor before and at the time of assignment.

Smith vs. Capers, 13 Ark., 9, was assumpsit on a promissory note made by Capers, January 3, 1845, payable to one McLemore, January 1, 1846, and endorsed to Smith, August 13, 1845. Capers pleaded payment to McLemore before maturity, and that on August 1, 1845, McLemore was indebted to him on divers accounts, and offered to set off. And the pleas were adjudged to be good.

In Block vs. Bowman, 9 Ark., 501, the endorsee of a land note, who had acquired it for value before maturity and had recovered judgment against the maker, was perpetually enjoined from collecting his judgment, the title to the land having failed. The endorsee had no notice of any infirmity in the paper, and did not even know that it was given for land. But the court considered that this made no difference, remarking: "Although the note on its face may give no indication of the defence to be offered, the assignee is understood to take subject to every defence which the maker could offer at the time of the assignment."

This language is quoted by Watkins, C. J., in Walker vs. Johnson, 13 Ark., 522, who sums up the anomalous position of the law affecting negotiable paper in Arkansas in these words: "We must, therefore, take it as the law of this state that the caveat does not rest upon the maker of negotiable paper to beware how he becomes instrumental in causing it to be put in circulation, to make due inquiry and to be cautious in protecting himself against loss or injury; but that the holder takes it at his peril, and with the risk of any latent equity that the maker could set up in any suit against the payee or obligee."

These cases have never been overruled or doubted. The statute itself is not ambiguous, and the settled construction of it is, that the right of set-off is not limited to such defences as were connected with the original transaction, but extends to all discounts or set-offs. Neither in Aldham vs. Wallace, supra, nor in Smith vs. Capers, supra, did the defence rest upon matter attached to or springing out of the contract sued on.

Small vs. Strong, 2 Ark., 198, was decided upon the territorial statute of December 23, 1818, (Steele and McCampbell's Arkansas Digest, pp. 352–3, sec. 107,) which only reserved to the maker of the paper such defences as arose out of the original contract. But the statute of assignments of 1837 went further, and was perhaps framed

with the express purpose of obviating the difficulty suggested in Small vs. Strong.—(See Walker vs. Johnson, 13 Ark., 529.)

It is claimed, however, that the old law has been repealed by the act of April 24, 1873, and in Sayre vs. Thompson, 28 Ark., 336, and Nisbet vs. Brown, 30 Ark., 585, this is said to be the case. But the point did not arise in either of those cases; in both the paper had been made and assigned before the passage of the last-mentioned act. Certainly there is no express repeal, and the repeal by implication works only to the extent of the repugnancy. So far from repealing, the later act is substantially a re-enactment of the old law, with a saving clause in favor of commercial paper. But this does not benefit the plaintiff in error, as his warrants do not belong to the excepted class.

I submit that the first of the questions certified should be answered in the negative and the second in the affirmative.

Respectfully submitted,

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